United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-4115

To be argued by
James M. Stillwaggon

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UNITED STATES COURT OF APEEALS
FOR THE SECOND CIRCUIT

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ROLANDO UBALDO,

Petitioner,

- v -

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

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P/S

PETITIONER'S BRIEF

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TABLE OF CONTENTS

TABLE OF CASES

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RESPONDENT'S BRIEF

PRELIMINARY STATEMENT

On October 3, 1974, Immigration Judge Howard Cohen denied the application of Rolando Ubaldo for a withholding of deportation under Section 243(h) of the Immigration and Nationality Act. (8USC 1253h)

That decision was upheld by the Board of Immigration Appeals on May 15, 1975. Rolando Ubaldo petitions for a review of that final finding of deportability.

FACTS

Rolando Ubaldo was born in Manila, Philippine Islands, on October 18, 1946. His former wife Solema Ubaldo and two children live in Manila.

In 1965 Rolando Ubaldo entered Far Eastern University in Manila to study electrical engineering. Because he had a family to support he was only able to attend classes on a part time basis. In 1967 he joined the Philippine Constabulary Criminal Investigation Service as an undercover agent. His specific assignment was to infiltrate the leftist youth groups at the Universities and report on the activities of the suspected Communist operatives and sympathizers.

During that time Ubaldo reported many students who were later "blacklisted" by the Marcos Government. His infiltration of the Kabatong Makabayon, an anti-Marcos underground association, led to the arrest of its chairman, Nilo Tayag, who was arrested and imprisoned. Another student leader, Jose Maria Sison, the founder of Kabatong Makabayon, and author of Philippine Social Revolution, escaped capture after being the subject of an investigation by Ubaldo. Sison is still at large and is believed to be

living in the mountains with a Communist rebel band.

While Ubaldo was in the Government Service as an undercover agent, he was able to observe the corruption of the Marcos regime first hand. He was even forced to pay "kick-backs" to Government payroll clerks in order to collect his pay. As his disgust with the regime grew, his efficiency as an agent waned. He was uncovered as an agent by the leftist groups. In early 1970 Ubaldo denounced the Marcos regime to his Superiors in the Criminal Investigation Service and tendered his resignation. From that time until he departed for the United States on December 19, 1971 he avoided any contact with activists for fear of reprisals by the leftists and punishment by the Marcos regime.

Rolando Ubaldo arrived in the United States as a visitor for business and pleasure in December of 1971. Once safely in the United States, Rolando Ubaldo decided to remain if he could. He sought employment and settled in Queens, New York.

On May 4, 1973 Ubaldo had his first deportation hearing. At that time he had not disclosed his political activity to his attorneys and he was not aware of the

possibility of political asylum. Immigration Judge Howard Cohen granted Ubaldo sixty days voluntary departure.

Ubaldo subsequently disclosed his political background to counsel and his fear of returning to the Philippines. On April 29, 1974 a motion was made to reopen the deportation proceedings for the purpose of an application under Section 243(h). A hearing was held on September 30, 1974 before Judge Cohen with Trial Attorney William Dunlop representing the Service.

At the hearing, Ubaldo testified that while a student at Far Eastern University he was a member of the Philippine Constabulary. Ubaldo further testified that his assignment was to infiltrate the Communist youth groups at the Universities and report on the activities of the leaders. (Appendix - transcript page 6.) Ubaldo testified that he was authorized to carry high powered firearms; he submitted documentary proof of his official capacity to the Immigration Judge (supra. pages 9 and 10). Ubaldo's activities, conversion from the Marcos' line and renunciation of the regime were all brought out at the hearing. He explained why he feared Communist reprisals and persecution by the Government because of his conversion.

Ubaldo's home was searched after his departure by Government agents.

At the hearing Immigration Judge Cohen refused to permit counsel to examine Mr. Wiesner (supra. pages 20, 21 and 22) who is Director of the Office of Refugee and Migration Affairs, the Department of State.

Judge Cohen's decision (Appendix) dated October 3, 1974 denied the application stating that Ubaldo failed to show a well founded fear of persecution and that the only testimony offered on his behalf was his own "self-serving claim".

Judge Cohen's decision was appealed to the Board of Immigration Appeals. The Board upheld the original decision (Appendix) in a one and one-half page decision which merely states that Ubaldo failed to make a "prima facie case of persecution".

STATUTES INVOLVED

Section 243(h) of the Immigration and Nationality Act (8USC 1253h).

> "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason."

8 CFR 242.17(c)

"Temporary withholding of deportation. The special inquiry officer shall notify the respondent that if he is finally ordered deported his deportation will in the first instance be directed pursuant to section 243(a) of the Act to the country designated by him and shall afford the respondent an opportunity then and there to make such designation. The special inquiry officer shall then specify and state for the record the country, or countries in the alternate, to which respondent's deportation will be directed pursuant to section 243(a) of the Act if the country of his designation will not accept him into its territory, or fails to furnish timely notice of acceptance, or the respondent declines to designate a country. The respondent shall be advised that pursuant to section 243(h) of the Act he may apply for temporary withholding of deportation to the country or countries specified by the special inquiry officer and may be granted not more than ten days in which to submit his application. The application shall consist of respondent's statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application and may present such pertinent evidence or information as he has readily available. The respondent has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion, or political opinion as claimed. The determination under section 243 (h) of the Act may be based upon information not of record if, in the opinion of the special inquiry officer or the Board, the disclosure of such information would be prejudicial to the interests of the United States."

THE ISSUES

The following issues are presented on the denial of the application for a withholding of deportation:

1. Whether this Court has jurisdiction to review the final order of the Board of Immigration Appeals.

2. Whether the Immigration Judge and Board of Immigration Appeals applied fair and realistic standards in this determination.

3. Whether the Immigration Judge abused his discretion in refusing to allow the questioning of the Director of the Office of Refugee and Migration Affairs.

4. Whether the Immigration Judge abused his discretion by cutting off a meaningful avenue of inquiry.

5. Whether it was an abuse of discretion for the Immigration Judge to disregard Ubaldo's testimony as"self - serving".

ARGUMENT

POINT I

THIS COURT HAS JURISDICTION TO REVIEW THE FINAL ORDER OF THE BOARD OF IMMIGRATION APPEALS, FOR ABUSE OF DISCRETION.

The relief which is provided by Section 243(h) is discretionary and is reviewable for an abuse of that discretion by the Attorney General or his designate. However, an alien before the Immigration Service who receives unfair treatment is not without remedy. Administrative tribunals must adhere to the norms set forth in the statute, by the regulations and by the Courts.

In the case of Wong Wing Hang v. The Immigration and Naturalization Service (360 Fed. 2nd 715) this Court considered a petition to review a denial of discretionary relief by the Board of Immigration Appeals. The petition was denied but this Court asserted its duty to subject the Board's decision for abuse; that is, to check that the Board of Immigration Appeals has properly applied the conditions prescribed in the statutes.

In Sovich v. Esperdy (319 Fed. 2d. 21 - 2d. Cir. 1963) the Court stated: (at page 27)

> "We hold that the Courts may review the Attorney General's construction of the statutory limits within which his discretion is to operate under Section 243(h)."

(Also at page 27)

> "Section 243(h) like its predecessor statute, reflected the humanitarian concern of Congress that aliens should not be expelled from our shores into the hands of totalitarian regimes unwilling to recognize even elementary standards of human decency. Neither the Attorney General nor his delegates in the Immigration and Naturalization Service are better able than we to gauge the bounds of that Congressional concern, and thus to define the limits within which the Attorney General's discretion is to operate."

The succeeding points of this argument shall deal with the "limits of discretion" and how they were unfairly applied to Rolando Ubaldo. It is sufficient for this point to state that this Court can and should review this case in line with the authority cited. Whether the standards which have been employed in this case are supportable in view of the Congressional intent and concern is the question which should be exhausted on this review.

POINT II

THE IMMIGRATION JUDGE AND THE BOARD OF IMMIGRATION APPEALS ERRED IN FAILING TO APPLY FAIR AND REALISTIC STANDARDS DENYING UBALDO'S APPLICATION.

The decisions below found that Rolando Ubaldo had failed to make out a "prima facie" showing of elegibility for relief under Section 243(h). With a frighteningly cold cavalier approach to Ubaldo's situation, the Immigration Service dismissed his claim as if he were a man with nothing to fear in his homeland.

Ubaldo is a man who has been on "both sides of the fence" in the Philippines. He can expect reprisals from both left and right upon his return.

The Board's own test for applications under Section 243(h) is recited at length in Matter of Dunar (Interim Decision No. 2192). The alien must show a "well founded fear" of persecution. The test is a subjective one because it is personal. Unfortunately, it is the Immigration Service and the State Department which is being "subjective" in deciding what nations are to be considered the object of a "well founded fear". A "prima facie" showing is whatever the Service is willing to accept at a given time.

In Dunar the proceedings were remanded for a Hungarian who had no political activity or resistance background.

In Sovich v. Esperdy (319 Red. 2nd 21) a Yugoslavian seaman based his fear on the probability of being punished for his illegal departure. The Court of Appeals reversed the denial and remanded the case.

In Kovac v. the Immigration and Naturalization Service (407 Fed. 2nd 102) another Yugoslavian seaman's case was remanded because he feared returning after seeking political asylum, he also claimed to have refused to work with the Hungarian Secret Police.

Laszlo Berdo (Berdo v. Immigration and Naturalization Service 432 Fed. 2nd 824) claimed to have been an Hungarian street fighter in the 1956 uprising. His fears of reprisals after his admissions were the basis of a reconsideration in his case.

Certainly these aliens from Communist Europe have no more political involvement than Rolando Ubaldo. If they have made out a "prima Facie" case under Section 243(h), he also has made out a case for relief.

The problem arises from Ubaldo's nation of origin. The Philippine Islands have always been our little Asian brother. The decision makers in the Immigration Service and State Department, either by choice or by chance, cannot envision atrocities and fascist tactics being employed by a long standing ally and former possession. It happened in Cuba; but they will not believe it is happening in the Philippines.

As a result, the standards employed in deciding the Ubaldo case were not the same as those used in the cases cited nor are they the standards demanded by the "Congressional Concern" for people escaping from tyranny.

POINT III

THE IMMIGRATION JUDGE ERRED IN REFUSING TO ALLOW UBALDO'S ATTORNEY TO QUESTION MR. WIESNER, DIRECTOR OF THE OFFICE OF REFUGEE AND MIGRATION AFFAIRS.

At Rolando Ubaldo's hearing on September 30, 1974, Judge Cohen refused to allow Counsel to question Mr. Wiesner, who made the conclusions that Ubaldo need not fear persecution. The constitutional right to confrontation was denied.

Although this right to confrontation of evidence and witnesses has regularly been denied to aliens in

deportation proceedings it should be permitted. Deportation is a serious and brutal punishment; the effects are often lifelong. Before an alien's dreams are snuffed out he should be afforded a meaningful hearing with the right to confront his accusers.

> "Deportation is a drastic sanction, one which can destroy lives and disrupt families, and a holding of deportability must therefore be premised upon evidence of 'meaningful association'."
> (Gastelan - Quiones v. Kennedy 374 U.S. 469)

When the result of a hearing can be deportation a respondent should be allowed the rights that our system grants to a defendant facing a fine or short term of imprisonment. But we send these people away forever without even facing the decision maker.

The right to confrontation has been upheld for a person denied admission to the bar (Willner v. Committee on Character and Fitness 373 U.S. 96) and to a person deprived of his retirement benefits on a loyalty issue (Garrott v. United States 169 Ct. Cl. 186, 340 Fed. 2nd 615) and to a private company employee who lost his security clearance (Greene v. McElroy, 360 U.S. 420). If these individuals who faced the loss of a particular livelihood were constitutionally entitled to confrontation and cross-

examination, Ubaldo should have been given the same opportunity when he stood before Judge Cohen facing deportation, practical banishment.

Mr. Wiesner should have been produced, as Counsel requested, for questioning as to the source of his information and the foundation of his conclusions. Judge Cohen's reliance upon this letter without confrontation was an abuse of discretion and denied Ubaldo a meaningful hearing.

POINT IV

JUDGE COHEN'S DENIAL OF A CONFRONTATION WITH THE STATE DEPARTMENT OFFICIAL CUT OFF A MEANINGFUL AVENUE OF INQUIRY.

Is is the fear of Ubaldo and many Filipinos that an unwritten agreement exists between the Immigration Service and the State Department to deny all relief under Section 243(h) to citizens of the Philippines.

The ritualistic and "form letter" language of Mr. Wiesner's letter lends credence to this fear. If such an "arrangement" exists it would amount to an abusive denial of relief to a class of persons, for the purpose of maintaining good relations in Manila.

This denial of questioning on a meaningful subject

by Judge Cohen was an abuse of discretion.

POINT V

IT WAS AN ABUSE OF DISCRETION FOR THE IMMIGRATION JUDGE TO DISREGARD UBALDO'S TESTIMONY AS "SELF SERVING".

Both Judge Cohen and the Board of Immigration Appeals disregarded the testimony of Rolando Ubaldo stating that it was"self-serving". The remark has a "wise crack" sound to it. What else would it be? The man is pleading for a safe haven from oppression; he certainly wouldn't shy away from serving his own interest.

As far as independent evidence is concerned, Ubaldo offered documentary proof of his official capacity which was accepted by Mr. Dunlop, the Service Trial Attorney. There is nothing else he can offer. Who will testify for a man seeking asylum? Certainly not the oppressor or the people he reported to the oppressor. Rolando Ubaldo stands alone and asks for relief but Judge Cohen will not listen because Ubaldo's testimony is "self serving".

The Board of Immigration Appeals has accepted an aliens testimony in asylum cases in the past.

> "However account will be taken of the limited evidence often available to the applicant, and his own statement will be given the most careful evaluation in the

> light of acceptable official knowledge."
> (Matter of Sihasale, 11 I&N Dec 531)
>
> "Usually the only way an adequate record can be created is by questioning the alien and his witnesses. While the Immigration Judge is authorized to impose reasonable limitations, he must allow the alien wide latitude in presenting his evidence."
> (Matter of Joseph, 13 I&N Dec 70)

Both Judge Cohen and the Board violated this avowed policy of accepting an aliens own testimony in proof of his application for relief under Section 243(h). This was an abuse of discretion.

CONCLUSION

The Court of Appeals should review this matter, and upon review, reverse the final administrative order.

Respectfully submitted,

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9/22/75